No. 363. 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

MOTION TO DISMISS OR AFFIRM.

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No. 565.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL.

MOTION TO DISMISS OR AFFIRM.

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the question presented is not of substantial importance, does not merit argument before this Court, and was properly decided by the Supreme Court of the State of Kansas.

OPINIONS BELOW.

No opinion was rendered by the District Court of Edwards County, Kansas. The opinion of the Supreme

Court of the State of Kansas is reported at 185 Kan. 274, 341 P.2d 1002, and is set forth in Appendix A to Appellant's Jurisdictional Statement at pp. 18-32.

STATUTES INVOLVED.

The pertinent statutes are set forth in the appendix to Appellant's Jurisdictional Statement at pp. 35-37.

JURISDICTION.

Appellant asserts that the jurisdiction of this Court is founded on 28 U.S.C. 1257 (2) in that the case involves the judgment of the highest court of a state in a case where the validity of a state statute was drawn in question as being repugnant to a law of the United States and the decision was in favor of its validity. Appellees concede that the United States argued before the Supreme Court of the State of Kansas that there existed a conflict between a federal and a state statute and appellees further concede that the Supreme Court of Kansas decided in favor of the validity of the state statute.

QUESTION PRESENTED.

Whether 28 U.S.C. 2410 (c) grants the United States, as the second mortgagee of real estate judicially foreclosed and sold in a suit in which the United States was afforded all the relief it sought but failed to protect its interest by bidding at the foreclosure sale, the right to redeem within one year from the date of sale when by state statute the mortgagor has the exclusive right to redeem during that period.

STATEMENT OF THE CASE.

The statement set forth in Appellant's Jurisdictional Statement adequately states the factual background to this controversy though appellees object to the assumption from time to time by appellant that 28 U.S.C. 2410 (c), under the circumstances of this case, is "authority" for redemption within the twelve month period by the Government. From appellees' viewpoint, the facts that the United States sought affirmative relief in the proceeding (Abs. 16), was granted such relief (Abs. 29-30), and failed to bid at the sale following foreclosure (Appellant's Statement, p. 4) are of prime importance in the determination of the question here presented.

THE QUESTION IS NOT SUBSTANTIAL.

The United States asserts that the question here presented is of substantial importance and consequently this Court should note jurisdiction of still another case on an already over-crowded docket. How the question can be substantial and important when this attempt by the appellant appears to be the first time the position taken by the United States has ever been argued before this Court is difficult to comprehend. The statute, now 28 U.S.C. 2410 (c), with minor changes unimportant here, was enacted on March 4, 1931. 46 Stat. 1528. It would seem that if the question were of critical importance it should have come to light long before this time.

To suggest, as appellant does, that because certiorari has been granted this Term in cases claimed to be "related", *United States* v. *Brosnan*, No. 137, and *United States* v. *Bank of America National Trust and Savings Ass'n.*

No. 183, jurisdiction should be noted here, is to overlook the conflict that existed among the Circuits on the questions presented in those cases. For example, the Government urged in its petition for a writ of certiorari in *United States* v. *Brosnan*, that four Courts of Appeals had considered the question there presented and that those four courts were evenly divided on the question. (See the petition of the United States in No. 137, O.T. 1959, at p. 5). Obviously the question there had reached the point where it was of substantial importance. It should be noted that the first time the question there was presented, *Metropolitan Life Ins. Co.* v. *United States*, 107 F.2d 311, certiorari was denied, 310 U.S. 630. Likewise, the second time the same question was presented, *United States* v. *Boyd*, 246 F.2d 477, certiorari was denied, 355 U.S. 889. Attention is also called to the government's memorandum brief in *Bank of America Nat'l Trust and Savings Ass'n* v. *United States*, No. 183, O.T. 1959, at pages 1-2, where the Government did not oppose certiorari for the reason that the clear conflict set forth in the petition in *United States* v. *Brosnan* existed. In the case at bar the United States is unable to demonstrate the same importance and substance as in the cases in which certiorari has been granted.

The suggested conflict between the decision of the Supreme Court of Kansas in this case and the decision of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Bank of America Nat'l Trust and Savings Ass'n, supra*, is non-existent. Anything said by the court in *Bank of America* concerning the issue here presented is clearly *obiter dicta*. This is made patently clear in the opinion on petition for rehearing when the court said:

> "The sole issue presented in this case by agreement of the parties was whether the sale under the

power contained in the mortgages gave the purchaser a title free and clear of federal tax liens." 265 F.2d at 869.

Thus any reference to redemption rights of the United States under 28 U.S.C. 2410 is dicta. No question concerning those rights had been presented.

A fundamental difference exists between the instant case and the four conflicting cases which gave rise to two writs of certiorari this Term. That difference is that each of those cases concerned *tax* liens of the United States. The fact that much confusion and difficulty exists concerning the extinguishment and priority of federal tax liens is well known to the Bar and to this Court and the determination of the questions presented in the four tax lien cases will serve as a guide in an area of the law fraught with problems. (See the Report of the Committee on Federal Tax Liens of the American Bar Association adopted by its House of Delegates in February, 1959.) Comparable confusion is non-existent concerning the question here presented. Furthermore, there is merit in the argument often propounded that the Government is entitled to greater protection when acting in its governmental function of tax-collecting than in a commercial function of money-lending. (Appellees do not concede, of course, that the United States needed any more protection than was available to it for complete protection of its rights in this case.)

It should perhaps be noted here that the one other case which the Government has asserted as being in conflict with the decision of the Kansas Supreme Court, *First National Bank and Trust Co.* v. *MacGarvie*, 22 N.J. 539, 126 A.2d 880, is a tax lien case and thus distinguishable from the case at bar. It is further distinguishable for the

reason that the United States there sought no affirmative relief after being summoned pursuant to 28 U.S.C. 2410. 126 A.2d at 882.

By way of a footnote in its Jurisdictional Statement (p. 15) the Government indicates that it is "advised" that the Farmers' Home Administration has made or insured presently outstanding loans of more than $120,000,000 which are secured by junior liens on real estate. If this assertion is intended to imply that there is some importance to the question presented because of the amount of money involved it must fall short of accomplishing that intended purpose. Initially, the precise question here cannot arise except in those states which give the mortgagor an exclusive statutory right of redemption for a fixed period following a judicial sale. The number of such states is limited. (Appellant's Statement, p. 16). What part of the $120,000,000 in outstanding loans is attributable to these states is not asserted by the Government. It must necessarily be a comparatively small sum. And judging from past experience as reflected by the dearth of cases, it seems highly unlikely that there will be any increase in default on mortgages followed by judicial sale and then redemption by the mortgagor when the United States is a second mortgagee. This is not a problem of great consequence since it arises so rarely. Unless and until the question ripens into one of substance the appeal should be dismissed.

Counsel for the appellant display real ingenuity in finding support for their position in the legislative history of 28 U.S.C. 2410(c). Try as we will we cannot read into the House Report the conclusions reached by the Government. Most of the referenced report concerns the "removal" provisions of the bill. The pertinent portion concerning redemption is as follows:

"The Senate amendment contains a clause allowing the court to stay proceedings on sale until the expiration of the next session of Congress. This was no doubt intended to allow Congress to appropriate money to enable the United States, if a junior lien holder, to bid enough at the sale to take care of prior liens and thus protect its own. In place of that the substitute bill provides that if a junior lien holder, the United States shall have a year in which to redeem. That does away with any necessity for a delay of sale. In many States of the Union there are now laws allowing junior lien holders as well as fee owners a year in which to redeem from execution and foreclosure sale of real estate. It is true that in other States no such equity of redemption exists. However, the provision adds nothing to the present difficulties in States which allow no redemption period, as under present conditions where present lien holders can not sue the United States, the rights of the United States never are barred by foreclosure decree." H.R. Rep. No. 2722, 71st Cong., 3d Sess. at p. 4.

We draw no real significance from this report at all. There surely is no clear expression of Congressional intent. If anything, it appears to us that the Conference Committee wished to provide a means for redemption in those states where no provision is made for redemption. There is no evidence that any conflict with existing state statutes was anticipated or that there was any intention to supersede an existing right created by state statute in a mortgagor.

The language of 28 U.S.C. 2410(c) would seem to us to imply the opposite conclusion from that reached by the United States. Certainly the section does not specifically say that a right of redemption is a condition to the filing of suit against the United States. The first sentence of subsection (c) states that a *judicial sale* in an action filed

pursuant to 28 U.S.C. 2410 shall have the same effect as to liens of the United States as is provided by local law. The third sentence of subsection (c) which is the one with which we are here specifically concerned states that where a *sale* of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year in which to redeem. "Sale" is not modified in that sentence by the word "judicial". It seems reasonable to assume then that what Congress had in mind was to provide a protection for the United States in those cases where the real estate was sold pursuant to a power in the mortgage or by other non-judicial sale. When sold by judicial sale, the rights of the United States were to be the same as any other lien holder. In Kansas then where only judicial sales are permitted following a mortgage foreclosure, G.S. Kan. 1949, 60-3107, the rights of the United States should be the same as those of any other person per subsection (a) of the federal statute. Any other person must, after foreclosure, bid at the sale to protect its interest. *Federal Land Bank* v. *Ludwig*, 157 Kan. 657, 158 Kan. 275, 143 P.2d 784, 146 P.2d 656. This the Government could and should have done. It is admitted that it was empowered to bid and buy to protect its interest. 7 U.S.C. (Supp. V) 1025. The fact that the Government failed to assert its rights in the appropriate manner and at the proper time should not now permit it to object to the fact that it has lost its security. (The United States of course continues to hold a valid personal judgment against the appellees.) The United States waited some four and one half months before attempting to redeem after the sale. One wonders what position appellant would take had the mortgagor exercised his right to redeem in the interim thus divesting appellant of its interest in the real estate. The United States then would have found itself in the same position in which it now finds itself.

As already noted, the first sentence in 28 U.S.C. 2410(c) provides that local law shall govern the rights of the United States in real property after judicial sale. If there is conflict between Kansas law and the federal statute as appellant asserts, there is likewise conflict between the first and third sentences of 28 U.S.C. 2410(c). The first sentence applies local law which gives the landowner the *exclusive* right to redeem for twelve months while the third sentence according to the appellant's argument gives the United States a right of redemption during this same period of time. It is hardly to be supposed that Congress intended to make contradictory provisions in the same act and yet if appellant's argument is correct that is precisely what Congress has done. Appellees argue, on the other hand, that the provisions of the federal statute may be harmonized and that the redemption right granted in the third sentence of 2410(c) has application following a non-judicial sale in those states providing no other means of redemption. The first sentence determines the rights after a judicial sale.

Of significance in the third sentence of subsection (c) of 28 U.S.C 2410 is the fact that the provision applies solely "where a sale is made to satisfy a lien prior to that of the United States." In this case, pursuant to the cross-petition in the state court by the United States, the sale of the real estate was made not only to satisfy a prior lien but to satisfy the lien of the United States as well. It was the order of the District Court of Edwards County, Kansas, that the real estate be sold and the proceeds be applied as follows:

"First: to the payment of the costs of this action, and of said sale;

Second: to the payment of all taxes which are a lien and payable on said premises at the time of said sale;

Third: to the payment of the first lien in favor of the plaintiff, John Hancock Mutual Life Insurance Company, a corporation;

Fourth: *to the payment of the second lien in favor of the defendant, the United States of America, and costs;*

Fifth: the balance, if any, to be paid to the person or persons entitled thereto under the direction of the court; together with accumulated interest on the liens to date of sale; . . . " (Italics added) (Abs. 30-31).

The fact that at the sale the high bid was insufficient for payment of the government's second lien is unfortunate but a remedy was available to the Government—appearance at the sale to insure a bid high enough to protect its interest. The relief sought by the United States in the state court was afforded it. The next step was up to the appellant. It simply failed to take that step.

It is obvious from appellant's jurisdictional statement and from its argument in the courts below that its position is based entirely on the proposition that 28 U.S.C. 2410 sets forth a fixed condition on the right to sue appellant, a condition which is absolute and creates rights in appellant superior to those given the mortgagor by state statute. Appellant overlooks the fact that when it came into the District Court of Edwards County, Kansas, it came in not only to be sued but to sue—to seek affirmative relief. This it was empowered to do pursuant to 7 U.S.C. 1014(f) (3), in which it is provided that the Farmers' Home Corporation "may sue and be sued in its corporate name in any court of competent jurisdiction." When the Farmers' Home Administration sought affirmative relief it must have been acting pursuant to the quoted authority. It sought relief in accordance with the procedure prescribed by Kansas statute. Its rights then should be governed by the laws of

the state under which it sought relief—the more so when in 28 U.S.C. 2410(c) Congress has said that a judicial sale shall have the "same effect" on liens held by the United States as is provided by local law. By local law the interest may be protected by bidding at the foreclosure sale. This the United States failed to do.

This Court has noted from time to time that when Congress establishes an agency authorized to engage in commercial and business transactions with the public and permits it to sue and be sued, "it cannot be lightly assumed that restrictions on that authority are to be implied." In the absence of a showing of a clearly contrary intention, "it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." See *Federal Housing Administration* v. *Burr*, ? 09 U.S. 242 at 245. It appears then that the Farmers' Home Administration, engaged in commercial transactions, is not to be presumed to be in a superior status to other lienholders without an explicitly clear mandate from the Congress to that effect. Such mandate does not appear in 28 U.S.C. 2410(c) or in anything else presented by appellant.

As has already been indicated, if the question here presented were of any real substance, it would have been asserted by the Government long before this. Federal agencies holding second mortgages on Kansas real estate have been subjected to the Kansas redemption statutes many times in years past and, to our knowledge, without objection. In fact, counsel for the federal agencies have recognized the exclusive right of the mortgagor to redeem during the first twelve months after a judicial sale. See, e.g., the motion for rehearing filed by the appellant, the

Federal Farm Mortgage Corporation, in *Federal Land Bank* v. *Shoemaker*, 155 Kan. 501, 126 P.2d 205, where counsel for the government agency said that appellant was seeking the right of redemption given it by Kansas statute "which right of redemption would, of course, be subject to the owner's exclusive right during the first twelve months of the redemption period." (Motion for Rehearing, Case No. 35554 in the Supreme Court of the State of Kansas, p. 4, now retained in the Kansas State Library, Topeka, Kansas.) In that case the Federal Farm Mortgage Corporation, a second mortgagee, was joined as a defendant, cross-petitioned, and asked for a finding that it was entitled to a right of redemption. It was recognized, however, that the mortgagor had the exclusive right to redeem for the first twelve months after the sale. To the same effect see *Federal Land Bank* v. *Ludwig*, 157 Kan. 657, 143 P.2d 784, in which, again, the Federal Farm Mortgage Corporation held a second mortgage on Kansas real estate, was joined as a defendant, cross-petitioned for foreclosure of its mortgage, and more than twelve months after the judicial sale sought to redeem. Counsel for the federal agency there recognized the validity of the Kansas statutes:

> " . . . the statute gives the defendant landowner an exclusive right to redeem the property at any time during the first twelve months following the sale by paying only the amount bid at the sale, with interest." (Abstract and Brief of Appellant in Case No. 35983 in the Supreme Court of the State of Kansas, p. 57, retained at the Kansas State Library, Topeka, Kansas.)

Thus it has been recognized by federal governmental agencies from time to time that the landowner enjoys a privilege in Kansas perhaps not accorded him elsewhere. There have been no catastrophic results when the land-

owner exercises that privilege and consequently the question here presented is not at this time of great significance. If the question had arisen often, or if the United States was not afforded a means of protecting its interest, the question might be of some importance. But absent either of those conditions the question presented is of no substantial importance.

CONCLUSION.

Since there is no real conflict in decisions on the question here presented, since this is the first time the question has ever been brought to this Court, and since the question is not of substantial importance, this Court should dismiss or affirm.

Respectfully submitted,

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